

succession among the heirs of the body of the various *præpositi* respectively, in the stated order of preference of the latter, which is generally prescribed in the dispositive clause. To construe the words "in all cases" so widely as to mean that heirs-female of the body of a preferred *præpositus* are to be excluded by an heir-male of the body of a postponed *præpositus* would involve a radical subversion of the scheme of succession, and against a construction leading to such a result there is a very strong presumption.

The Court answered the first question of law in the affirmative and the second and third in the negative.

Counsel for the First Party—Chree, K.C.—R. C. Henderson. Agents—Scott & Glover, W.S.

Counsel for the Second Party—Watson, K.C.—D. P. Fleming. Agents—Dundas & Wilson, C.S.

Counsel for the Third Parties—Constable, K.C.—MacRobert. Agents—Mitchell & Baxter, W.S.

Friday, December 19.

## SECOND DIVISION.

(SINGLE BILLS.)

### WORLING AND ANOTHER (MILNE'S TRUSTEES), PETITIONERS.

*Trust—Nobile Officium—Advance to Beneficiary Prior to Date of Payment under Will.*

A testator executed a trust settlement six years before he died, at a time when his estate was much smaller than it had become at the date of his death. He left a small annuity to his widow and directed that the residue should vest in his children on her death or second marriage, but payment should not be made to them until they attained majority. Power was given to the trustees to make advances for the education, maintenance, or advancement in life of any of the children who might be in minority at the date of vesting. In exercise of its *nobile officium* the Court authorised the trustees to make a yearly allowance to a daughter who had attained majority and kept house for the mother and a younger sister.

James Worling and another, the testamentary trustees of James Strachan Milne, preserved provision manufacturer, Aberdeen, *petitioners*, presented a petition to the Court seeking authority to advance yearly allowances to the daughters of the testator.

The *petition* was in the following terms:—  
"That by his said trust-disposition and settlement the said James Strachan Milne disposed to and in favour of the persons therein mentioned as trustees his whole means and estate, heritable and moveable, real and personal, but in trust always for

the purposes therein specified, and he nominated his trustees to be his sole executors. By his said trust-disposition and settlement the said James Strachan Milne, after directing payment of his debts, sick-bed and funeral expenses, and the expenses of the trust, provided as follows for the disposal and distribution of his estate, viz. —(Second) For implement of the following provisions in favour of my wife Mrs Agnes Gall or Milne in the event of her surviving me, declaring that the same, so far as in liferent, shall subsist only so long as she remains my widow, viz.—(1) For payment to her of a legacy of One hundred pounds to provide for her mournings, etc.; (2) for payment to her of the sum of Three hundred pounds per annum free of all deductions, including income tax, which amount shall be paid quarterly, the first payment to be made three months after my death for the quarter preceding, and I declare that the said allowance of Three hundred pounds shall be purely alimentary and not subject to the debts or deeds of my wife nor liable to the diligence of her creditors; and (3) I direct my trustees to allow my said wife to occupy free of rent the house number Twenty-six Erskine Street foresaid presently belonging to and occupied by me, or any other house which may belong to and be occupied by me at the time of my death, and the use of all my household furniture, pictures, plate, etc.: Declaring that my said wife shall not be charged with or liable for feu-duty, interest of debt, any rates, taxes, or assessments in respect of property (tenant's taxes alone excepted) or for repairs: (Third) Subject to the foregoing provisions in favour of my wife, I direct my trustees to hold the whole residue of my means and estate, including the share belonging to me as ascertained at the date of my death in the firm of Alexander Milne and Sons, preserved provision manufacturers, Canal Road, Aberdeen, of which I am a partner, for behoof of my whole children, and on the death or second marriage of my wife as soon thereafter as may be convenient, but only at such times and on such occasions as they in their absolute discretion shall consider most expedient for the judicious realisation of my estate, to realise and convert my whole means and estate into cash and divide the same equally between my whole children, share and share alike: Declaring that any advance or advances which I may have made during my life to any of my said children shall be deducted from the share respectively falling to them: Declaring also, as it is hereby specially provided and declared, that the period of vesting of the shares of my said estate falling to my said children shall be as at the date of the death or re-marriage of my said wife and not a *morte testatoris*: Declaring further that in the event of any of my said children dying before said date of vesting without leaving lawful issue, the share which such child or children would have taken had he or she survived shall be imputed as part of my estate and divided amongst my remaining children accordingly: Declaring further that should any of my said children prede-

cease the said term of vesting leaving lawful issue, such issue shall be entitled, share and share alike, to the share which their parent would have taken had he or she survived said term: And I especially wish it to be understood that although vesting shall take place in favour of my said children on the death or re-marriage of my said wife as before provided for, payment of said share shall not be made to said children until they respectively attain majority: Providing nevertheless that it shall be in the power of my said trustees, should they see fit, to advance for behoof of any of my said children who may be in minority at the period of vesting hereunder such part of their share as my trustees may deem necessary for their education, maintenance, or advancement in life: Declaring that my said trustees shall be the sole judges as to the expediency of any such advance, and that should any advance be made my said trustees may either expend the same themselves for behoof of such child or children or pay the same to my said wife, whose receipt shall be a full and sufficient discharge to my said trustees: And it is hereby specially declared that the provisions herein conceived in favour of my said wife and children are to be accepted by them in full of all claim to terce, *jus relictae*, legitim, or other legal claim competent to them or either of them.' The testator died on 11th January 1919 leaving a widow Mrs Agnes Gall or Milne and four children, viz., James Milne, George Milne, Agnes Milne, and Muriel Milne, who all still survive. The two sons and the daughter Agnes had all attained majority at the date of their father's death. The daughter Muriel is still a minor, and will not attain majority until March 1923. The said two sons are now both married and have set up houses for themselves. The said two daughters are both unmarried, and neither of them had been trained by the testator for any profession or employment. The free residue of testator's estate after payment of all claims and Government duties is estimated to amount to at least £40,000, and the revenue from this may be estimated at £2000 a-year. This revenue is at present being accumulated with the capital of the trust, as under the terms of the will the children can get no vested interest in the residue of the estate until the death or re-marriage of the said Mrs Milne. At the time when the testator made his will in 1913 [18th February] it is believed that his means would not have been much more than sufficient to meet the provisions for his widow, but during the last few years of his life his business was very prosperous. During the last few years of his life he on more than one occasion spoke to his agent about making a new will, but before he had actually carried out this intention he was suddenly taken ill in January 1919 and died after a few days' illness. The widow Mrs Milne has been in bad health for some time past, and has required an expensive course of treatment which cannot be carried out at home. The annuity of £300 provided for her under the will as aforesaid is at present not sufficient for her

maintenance having regard to the cost of her special treatment and the cost of the upkeep of the house, 48 Forest Road, Aberdeen, which belonged to the testator at his death, and of which in accordance with the terms of the will as afore mentioned she now has the liferent. Since her mother's health became bad the said Agnes Milne has had sole charge and management of the home at 48 Forest Road, Aberdeen, where along with her sister Muriel she has lived continuously since her father's death. The whole family have expressed to the petitioners their desire that the house should be kept up, as they are hopeful that their mother may be able to take up her permanent residence there as contemplated by the testator, and that allowances should be made to the daughters out of the revenue (or failing revenue, out of the capital) of the trust estate to enable them to maintain themselves and to keep on the house at 48 Forest Road as a family home. The yearly allowances suggested are £400 to the said Agnes Milne for her own maintenance and the upkeep of the house, and £250 to the said Muriel Milne for her maintenance and education. Looking to the cost of living generally and to the expense of the upkeep of the house, and to the fact that the said Muriel Milne is now at an expensive stage of her education—having decided to make a special study of music, for which she has an aptitude—the petitioners consider that these allowances are reasonable in the circumstances. The deceased's widow, the said Mrs Agnes Gall or Milne, and his two sons, the said James Milne and George Milne, and his two daughters, the said Agnes Milne and Muriel Milne, who are the whole parties interested in the deceased's estate, have expressed their approval of and requested the petitioners to make the allowances referred to. The petitioners are advised that under the testator's settlement they are not empowered, or at least are not in safety, to make the proposed advances without judicial authority. They accordingly present this application to your Lordships. May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute-book in common form, and to be served on the said Mrs Agnes Gall or Milne, James Milne, George Milne, Agnes Milne, and Muriel Milne personally or at their respective dwelling-places, and edictally on the curators of the said Muriel Milne if she any has, and to ordain them to lodge answers hereto, if they any have, within eight days after service; and after resuming consideration hereof with or without answers, to authorise the petitioners to advance to the testator's said daughters Agnes and Muriel Milne out of the surplus income, or otherwise out of the capital of the trust estate under their charge, so long as the testator's said daughters shall be unable to suitably maintain themselves, or until your Lordships shall otherwise direct, yearly allowances of £400 and £250 respectively, or such other yearly sums as to your Lordships shall seem reasonable and sufficient for their maintenance and support: Further, to authorise the

expenses of and incident to this application to be paid out of the trust estate, or to do further or otherwise in the premises as to your Lordships may seem proper.”

Argued for the petitioners—The authority sought so far as regards the allowance to Muriel, who had attained majority, involved the exercise by the Court of its *nobile officium*, but it was plainly in accord with the testator's intentions. *Robertson's Trustees, Petitioners*, 1909 S.C. 236, 46 S.L.R. 139, was referred to.

The Court without delivering opinions pronounced this interlocutor—

“... Authorise the petitioners to advance to the daughters of the late James Strachan Milne, Agnes and Muriel Milne, out of the surplus income or out of the capital of the trust estate under the petitioners' charge, so long as the said daughters shall be unable to suitably maintain themselves or until further orders by the Court, yearly allowances of £400 and £250 respectively for their maintenance and support, and decern. . . .”

Counsel for the Petitioners—Chree, K.C.  
—C. Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, November 27.

## FIRST DIVISION.

[Sheriff Court at Ayr.

WILLIAM BAIRD & COMPANY,  
LIMITED v. M'GRAW.

*Master and Servant—Workmen's Compensation—“Arising out of”—“In the Course of”—Workman Returning for Pay and Sitting between Rails—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1).*

A boy employed at the picking tables at a coal pit went to the pit on the pay day, not to work but to draw pay which was due to him. If he had been working on that day he would have got his pay line from the man in charge of the boys working at the picking tables. By the routine at the pit, when a boy was not working on the pay day his pay line was handed to the pit-head gaffer. The boy knew he would require to get his pay line from the gaffer. He arrived at the pit a little before the time when in his experience the gaffer brought round the pay lines, and sat down on a block of wood which was situated between a pair of rails on which and behind the boy there was a waggon spragged to prevent it moving towards a fire which was also between the rails and in front of the boy. The day was cold and wet and the boy took up that position to warm himself while waiting for the gaffer. He thereafter got up and searched for the gaffer unsuccessfully. He then returned to the fire,

when another boy told him he expected the gaffer to be round with his pay line immediately, and the boy in question then resumed his seat on the block. The block was reached by descending a stair from the picking tables, and it was the regular custom for the pickers and other workers at the pit-head to come round the fire in cold weather and eat their pieces. While the boy was sitting on the block, owing to the carelessness of some other workman a waggon was allowed to run into the spragged waggon. It knocked out the sprag and caused the waggon to run over the boy's leg, which had to be amputated. In an arbitration for compensation the arbitrator held that the accident arose out of and in the course of the employment.

*Held* that upon the facts stated the arbitrator could competently so find.

William Baird & Company, Limited, coal-masters, Auchincruive Collieries, Prestwick, appellants, being dissatisfied with an award of the Sheriff-Substitute at Ayr (BROWN) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought against them by Thomas M'Graw junior, respondent, appealed by Stated Case.

The Stated Case set forth—“The following facts were admitted or proved:—1. In March 1919 the respondent, a boy of sixteen years of age, was employed by the appellants as a coal picker at the coal picking tables at their Mossblown Pit. 2. The coal picking tables are on the pit-head, which is reached by a stair from the ground level. The tables work on the endless chain principle. The coals from the pit are dropped through shakers on to the upper end of the table. As the coals are carried along the table, the coal pickers standing on each side of the table, pick out the stones and grit. The coals then drop into a chute at the lower end of the table, and slide into a railway waggon standing on the rails on the ground level at the west side of the pit-head. This waggon, which is looked after by a lad called a ‘trigger,’ is spragged, while being loaded, by means of a ‘scutch,’ which is a triangular piece of wood placed on the rails in front of the wheels of the waggon. When the waggon is filled the trigger withdraws the scutch and removes the waggon westward along the rails into the lies or sidings beside the Glasgow and South-Western Railway which runs past the mine. He then brings up an empty waggon into position and sprags it in similar fashion. 3. Parallel to the line of rails on which the coal waggon is standing while being filled is another line of rails called the Diamond Road. This line runs from the lies past the south side of the pit-head and terminates at the saw mill to the east of the pit-head. On the Diamond Road on wet and showery days, down to the date of the accident after mentioned, a fire was kept burning between the rails close to where the trigger was working. The purpose of this fire was to dry the scutches used for spragging the waggons. 4. It was the regular custom for the triggers, coal pickers, and other workers at the pit-head to come round the fire in